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Office of Administrative Law Judges
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2003-LHC-00458

OWCP Nos.: 18-37895
18-39444
18-57051
18-57052
18-75210

In the Matter of:

ANTHONY ZUVICH,
Claimant,

v.

MAERSK PACIFIC, LTD.,
F.A. RICHARD & ASSOCIATES,
INTERNATIONAL TRANSPORTATION SERVICES, SIGNAL COMMERCIAL INSURANCE
Respondents.

Appearances: James McAdams, Esq.
For the Claimant

Eric Dupree, Esq.
For the Respondent, ITS

Daniel Valenzuela, Esq.
For the Respondent, Maersk

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 ("the Act"). The Act provides

compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. This claim was brought by Anthony Zuvich ("Claimant") against International Transportation Services, Inc. ("ITS") and its carrier Signal Commercial Insurance ("Signal"), arising from an injury to the right hip and leg while employed as a longshore worker. Claimant did not file a claim for injury against Maersk Pacific, LTD ("Maersk") and its Carrier F.A. Richard & Associates ("F.A. Richard"), rather joinder was requested by ITS.

On November 20, 2002, the Director, Office of Worker's Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to the undersigned on January 9, 2003. A formal hearing was held before the undersigned on May 22, 2003 in Long Beach, CA, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Administrative Law Judge Exhibits ("AX") 1-4, Claimant's Exhibits ("CX") 1-12, ITS's Exhibits ("ITSX") 1-9, and Maersk's Exhibits ("MX") 1-4 were admitted into the record. Claimant testified at the hearing.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

Stipulations

The parties stipulate and I find:

1. An employer/employee relationship existed as between Claimant and each employer during the relevant periods.

2. Coverage under the Act exists as to the claims against both employers.

3. The claim was timely noticed and filed.

4. Claimant's average weekly wage was $2,648.90.

5. Claimant has suffered an injury.

6. The alleged injury is unscheduled.

7. Respondents are not currently providing compensation or medical benefits.

Issues

The issues remaining to be resolved are:

1. The identity of the last responsible employer.

2. The date of maximum medical improvement.

3. The extent of Claimant's disability.

4. Entitlement to medical expenses.

5. Interest on past due benefits, if any.

6. Assessment of attorney fees and costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

Claimant was born on August 18, 1938 and graduated from high school in 1956. Hearing Transcript ("TR") at 26. In 1956, Claimant dislocated his hip, endured conservative treatment and was without recurrent complaints following recovery. Claimant was hired by ITS in 1984 and began longshoring at its Container Freight Station ("CFS"). TR at 29. Claimant's container loading/unloading duties at ITS were physically demanding as he routinely lifted up to 200 pounds of cargo. TR at 31. Claimant testified that lifting heavy cargo required prolonged or repetitive bending, turning and twisting back activities. TR at 33.

On May 10, 1988, Claimant injured his right back and hip while performing his work duties at ITS. TR at 32. Claimant testified he was unloading a container with a partner. TR at 31. In the process of unloading the container, Claimant maneuvered by hand an extremely heavy box of bolts. Normally a forklift-type machine would go in the container and grab the box. TR at 32. However, the boxes were packed tightly in the container, requiring Claimant and his partner to manually clear some of the boxes by hand in order to make an opening for the machine to grab the remaining boxes. TR at 32. Manual clearing of the hundred pound boxes placed Claimant in awkward positions as he wrestled with the tightly packed boxes in order to get them out. TR at 32. In the course of manually clearing the hundred pound boxes, Claimant felt a sharp pain in his back and right hip. TR at 33. Claimant immediately reported his injury to ITS. TR at 33.

On May 12, 1988, Claimant reported to Dr. Jordan Rhodes, an orthopedic surgeon in Redondo Beach, CA. TR at 33. Dr. Rhodes, who became Claimant's treating physician, performed a comprehensive physical examination. TR at 33. Dr. Rhodes diagnosed an acute sprain of the lower back and right hip, secondary to superimposition of industrial stresson early asymptomatic degenerative changes involving the right hip joint. CX 9 at 166. Claimant was placed on non-work status and referred to a physical therapist. TR at 33-34. Claimant saw Dr. Rhodes every two to three weeks and continued his physical therapy treatments. After three or four months of treatment, Claimant testified his condition improved. TR at 34. On August 26, 1988, Dr. Rhodes authorized Claimant's return to work without restrictions. TR at 34; CX 9 at 168. Accordingly, Claimant resumed his full time work duties as a longshoreman at ITS. TR at 34. On several occasions during the following year, Claimant sought treatment for increased

back and hip pain. TR at 35. Dr. Rhodes prescribed medication and advised that Claimant leave the CFS and seek lighter work duties. TR at 36.

On September 6, 1988, Claimant was evaluated by Dr. James London, an orthopedic surgeon. CX 12 at 66. Claimant was diagnosed with a lumbosacral strain thatexacerbated a pre-existing post-traumatic arthritic condition in the right hip as a result of his work activities on May 10, 1988. CX 12 at 227. In his medical report, Dr. London stated Claimant could continue to perform his regular work duties but should avoid prolonged standing, climbing and repeated squatting. CX 12 at 229. Dr. London noted this restriction was necessitated by the post traumatic arthritic condition which resulted from Claimant's hip dislocation, and was not related to the industrial injury on May 10th. CX 12 at 229. Although, Claimant's position was not yet permanent and stationary, Dr. London anticipated it becoming permanent and stationary in approximately six weeks. CX 12 at 229.

On October 20, 1988 Claimant saw Dr. Rhodes on an urgent basis. CX 9 at 170. Claimant told Dr. Rhodes thatwork activities during the past four days aggravated the pain in his right low back and hip. CX 9 at 170. Claimant's pain was so severe on the morning of October 20th, that he was unable to go to work. CX 9 at 170. Claimant was diagnosed with a spasm without localized tenderness in the low back region. CX 9 at 170. Claimant was placed on non-working status and temporary total disability of one week. CX 9 at 170. Claimant was next seen by Dr. Rhodes on October 25, 1988. CX 9 at 170. While Claimant's condition had improved, he mentioned that standing and bending caused discomfort in his right back and hip. Dr. Rhodes advised lighter work duties. CX 9 at 170.

On June 26, 1989, Claimant was examined byDr. London. CX 12 at 230. Dr. London concluded Claimant had recovered from the effects of his industrial injury on May 10, 1988. CX 12 at 232. Dr. London opined Claimant's condition was permanent and stationary and there were no factors of permanent disability relative to the industrial injuries of May 10, 1988. CX 12 at 232. Dr. London noted Claimant's current symptoms were related to degenerative joint disease in the right hip resulting from his hip dislocation in 1956. CX 12 at 232. Dr. London recommended Claimant continue medication and authorized Claimant's return to work without restrictions. CX 12 at 232.

On July 13, 1989, Claimant was examined by Dr. Rhodes. CX 9 at 178. Claimant primarily complained of the effects of unrestricted weight bearing activities on the right hip. CX 9 at 179. Dr. Rhodes placed Claimant on non-working status for three months, which could be abbreviated if Claimant obtained work with simple weight bearing activities or minimal bending, stepping or lifting. CX 9 at 179.

On August 7, 1989, Dr. Rhodes reviewed Dr. London's June 26, 1989 medical report and noted the conclusions were without foundation. CX 9 at 180. Specifically, Dr. Rhodes reported there was no basis upon which to formulate a theory of apportionment with Claimant's residual disability stemming from the May 10, 1988 injury. CX 9 at 180. Dr. Rhodes noted Claimant had been asymptomatic for 36 years with regard to the prior hip injury. CX 9 at 180. Dr. Rhodes concluded Claimant's May 10, 1988, injury precipitated the onset of symptoms which might not have otherwise been anticipated to have occurred spontaneously. CX 9 at 180.

In September of 1989 Claimant left the CFS and began working off the union's casual board, a position he held for approximately eight years. TR at 36. Claimant primarily performed signal and clerking duties which required prolonged standing. TR at 38. On November 20, 1989 Claimant was evaluated by Dr. Rhodes. CX 9 at 185. Claimant told Dr. Rhodes about occasional pain in his right back and hip. CX 9 at 185. Dr. Rhodes authorized Claimant's return to work with restrictions. CX 9 at 185.

On March 23, 1990, Claimant was examined by Dr. Rhodes. Claimant continued to complain of hip pain when his work activities required him to stand continuously for more than one hour. CX 9 at 185. In his medical report, Dr. Rhodes noted Claimant would require medical care relative to the right hip region for the remainder of his life. CX 9 at 186-7. This recommendation was made in anticipation of the progressive nature of Claimant's right hip arthritic process. CX 9 at 187.

On November 14, 1990, Dr. London reviewed the x-rays taken by Dr. Rhodes office on May 12, 1988. CX 12 at 233. In his medical report, Dr. London noted arthritic changes in Claimant's right hip joint characterized by joint space narrowing, indicating degeneration and loss of articular cartilage in the right hip joint. CX 12 at 233. Dr. London also noted reactive sclerosis or increased bone formation beneath the cartilage, and stated these changes were typical of mild to moderate post-traumatic arthritis. CX 12 at 233. The cartilage had worn down and partially disappeared, constituting a permanent disability predisposing Claimant to further injury. CX 12 at 233. Dr. London concluded once the cartilage starts to wear away, the process worsens with time and even normal activities such as walking and standing cause further degeneration. CX 12 at 233. Dr. London disagreed with Dr. Rhodes conclusions that there was no basis on which to formulate a theory of apportionment for Claimant's condition. CX 12 at 234. Dr. London noted approximately 30-40% of all individuals with a traumatic dislocation of the hip go on to develop post-traumatic arthritis, which he believed was the case with Claimant. CX 12 at 235. Countering the fact that Claimant had been asymptomatic for 36 years, Dr. London contends Claimant exhibited advanced changes of post traumatic arthritis on his initial x-rays taken on May 12th, that were present for many years prior to Claimant's May 10th injury. CX 12 at 235. Furthermore, Dr. London noted industrial injuries aggravated and worsened Claimant's pre-existing condition resulting in greater disability, and would have to be heavily apportioned to the pre-existing post traumatic arthritis manifested on the May 12, 1988 x-rays.

In his August 14, 1992, Supplemental Industrial Orthopedic Report, Dr. Rhodes noted Claimant was experiencing intense pain in his low back when standing for more than 15-30 minutes. CX 9 at 188. Dr. Rhodes noted there had been further loss of ground in terms of functional capacities and comfort with activities. CX 9 at 190. Dr. Rhodes concluded the need for future medical care was quite obvious and anticipated a slow but steady decline with diminution in functional capacities over the next several years. CX 9 at 190.

In Dr. Rhodes' February 18, 1993, Supplemental Industrial Orthopedic Report, he noted Claimant's right hip was deteriorating. CX 9 at 192. Dr. Rhodes stated Claimant was capable of limited work activities, but would need to consider hip replacement surgery within the next five years. CX 9 at 192. Dr. Rhode's opinion remained unchanged for the next two years. CX 9 at 198.

On April 6, 1993, Claimant was examined by Dr. London. CX 12 at 245. Claimant complained of soreness in his lower back and intermittent pain in his right hip. CX 12 at 245. Claimant stated the pain worsened with movement. CX 12 at 245. Dr. London opined Claimant was capable of working off the casual board but should be restricted from work that involves repeated bending and walking. CX 12 at 250. Dr. London did not believeClaimant was in need of surgery at that time. CX 12 at 250.

On January 18, 1996, a Decision and Order Awarding Benefits was awarded by an Administrative Law Judge ("ALJ"). CX 1 at 14. The ALJ ordered ITS to pay Claimant permanent partial disability benefits at the rate of $100 per week. CX 1 at 14. This award sought to compensate Claimant for loss of earnings and earning capacity since working on the casual board. TR at 39.

In 1997, Claimant earned an opportunity to change his work classification to Marine Clerk. TR at 40. For the next few years, Claimant worked for several companies for varying periods. Claimant testified that working in the clerk's union was less physically demanding and an increase in salary. TR at 84. As a marine clerk Claimant performed various duties. As a floor runner, Claimantdrove around the terminal placing magnets on containers to help identify the load so he could input the information in the computer. TR at 41. As a yard clerk, Claimant's duties included driving around the container yard locating empty containers and entering numbers in the computer tracking system. TR at 43. As a gate clerk, Claimant worked in a booth containing a computer. Truckers drove in on either side of the booth and brought Claimant their paperwork. Claimant's duties included checking the numbers on the containers to track the cargo and occasionally checking the contents of the container itself TR at 45. Claimant testified his duties as a gate clerk were more physically demanding, requiring more walking than his duties as a yard clerk. TR at 46.

On September 17, 1999, Claimant was examined by Dr. Andrew Spitzer, who became Claimant's treating physician upon the retirement of Dr. Rhodes.[1] A comprehensive orthopedic evaluation was performed and Claimant was diagnosed with severe degenerative joint disease of the right hip, a disability Dr. Spitzer believed was caused from the activities of employment. CX 6 at 34. Dr. Spitzer concludedwork after the May 1988 injury caused deterioration in Claimant's hip. CX 6 at 34. Dr. Spitzer suggested Claimant could work without restrictions, but would ultimately require sedentary activity. CX 6 at 35. Dr. Spitzer believed Claimant was a surgical candidate, but ultimately left the decision to Claimant based on the severity of his pain and ability to work. TR at 78. Following this diagnosis, Claimant tried medication, physical therapy and lighter work duties to avoid or delay the need for surgery.

On May 13, 2000, an ALJ modified the 1996 Decision and Order Awarding Benefits and granted Claimant a nominal permanent partial disability award in the amount of $1 a week. CX 2 at 17. The ALJ reduced the original award due to Claimant's increased earnings as a marine clerk. CX 2 at 17.

[1] Claimant last saw Dr. Rhodes in 1995. Claimant testified that he does not recall who his treating physician was between his last visit with Dr. Rhodes and his first appointment with Dr. Spitzer. TR at 103-4.

On August 15, 2000, Claimant was examined by Dr. Spitzer. According to the notes for the visit, Claimant complained of severe pain in his right hip. CX 10 at 210. In his deposition testimony, Dr. Spitzer stated Claimant's x-rays revealed severe arthritis in the right hip as well as degeneration of the hip condition with complete bone on bone contact in the superior joint space in the hip. MX 4 at 35; CX 10 at 211. At this point, Dr. Spitzer opined Claimant had reached a point at which he was experiencing severe pain and recommended Claimant proceed with total hip arthroplasty. TR at 59; CX 10 at 211. Claimant agreed and asked Dr. Spitzer to schedule the surgery. Claimant's last employer prior to his August 15th visit with Dr. Spitzer was Maersk. CX 5 at 29. However, Dr. Spitzer sent the request for authorization to perform surgery to ITS. TR at 60. ITS denied the request, forcing Claimant to make arrangements for surgery through his union plan health insurance. TR at 62.

On November 1, 2000, Claimant was examined by Dr. London. ITSX 4 at 115. Claimant complained of frequent pain in his right back and hip and mentioned that he had scheduled hip replacement surgery in August of 2000. ITSX 4 at 116. Dr. London opined Claimant's condition remained permanent and stationary. ITSX 4 at 119. Dr. London stated Claimant sustained an ongoing aggravation to his right hip and knee as x-rays revealed complete absence of superior joint space with increased reactive sclerosis on both sides of the joint space. ITSX 4 at 120. Dr. London agreed Claimant was in need of medical treatment and right total hip arthroplasty. ITSX 4 at 119. Although, Claimant was capable of continuing work as a gate clerk and yard supervisor, Dr. London recommended he refrain from work with greater physical requirements than those jobs. ITSX 4 at 119. Dr. London attributed Claimant's current condition to his continued employment. ITSX 4 at 120.

On January 9, 2001, Claimant saw Dr. Spitzer for a preoperative visit regarding his right total hip arthroplasty. CX 10 at 213. Claimant indicated he continued to have severe pain thatwas unresponsive to conservative treatment. CX 10 at 213. According to the preoperative report prepared by Dr. Spitzer, there was no appreciative change in the x-rays however they revealed Claimant was in the end stage of his degenerative joint disease. CX 10 at 213. Dr. Spitzer testified that in the prior three or four months, Claimant continued to have severe pain in his right hip. MX 4 at 37. Claimant's last employer prior to his January 9th visit was Maersk. CX 5 at 29.

Claimant's last day of Employment before hip surgery was January 16, 2001.[2] Claimant worked for ITS which hired him as a gate clerk. TR at 79. According to Claimant, he worked nine hours in a booth at the ITS gate. TR at 81. Claimant testified that he left the booth to check the contents of trucks approximately seven to ten times an hour. TR at 81. Each time Claimant left the booth, he had to step down a one foot curb to go over to the truck, then come back and step up the one foot curb back into the booth. TR at 82. Claimant testified that by the end of the day his pain had increased. Claimant admitted to intentionally seeking work at ITS the day before surgery. TR at 91. Claimant stated his intent was to hold ITS responsible for his hip

[2] From February 13, 2000 to January 11, 2001, Claimant clerked exclusively at Maersk. TR at 53. Claimant testified that he preferred and actively sought jobs at Maersk because of his familiarity with the terminal and because the job was more conducive with his hip condition. TR at 80. On January 12, 2001, Claimant worked at ITS. On January 14th, Claimant returned to his job at Maersk.

replacement surgery since ITS was disputing any further liability for his hip condition. TR at 106.

Hip replacement surgery was performed by Dr. Spitzer on January 17, 2001. On February 8, 2001, Claimant was examined by Dr. Spitzer. CX 10 at 216. In his post-operative report, Dr. Spitzer noted Claimant was experiencing some pain since the surgery. CX 10 at 216. Dr. Spitzer prescribed Vioxx and physical therapy. CX 10 at 216.

On March 3, 2001 Claimant filed a claim for compensation under the Act. CX 4 at 22. The claim sought compensation from ITS for Claimant's back, hip and leg injury while employed as a longshore worker.

On April 19, 2001, Claimant was examined by Dr. Spitzer. CX 10 at 217. Claimant had recently ceased taking Vioxx and was anxious to return to work. CX 10 at 217. Dr. Spitzer authorized Claimant's return to work at relatively sedentary activity. CX 10 at 218. Accordingly, on June 3, 2001, Claimant returned to full time work at Maersk as a marine clerk. TR at 72. Claimant testified that since surgery his pain is gone, although symptoms arise at times. Medical records reveal the surgery improved Claimant's condition and function. CX 6 at 44.

On June 17, 2001, Claimant was evaluated by Dr. London. CX 12 at 242. Claimant mentioned soreness and stiffness in his right hip. CX 12 at 242. Dr. London noted Claimant sustained an uneventful post-operative course after surgery and his condition was permanent and stationary. ITSX 4 at 114. Furthermore, Dr. London noted Claimant was capable of performing the work of a marine clerk with some restrictions, and concluded he was not in need of medical treatment at the present time. CX 12 at 243.

On September 19, 2001, Claimant filed a Petition for Modification of the May 13, 2000 award of nominal permanent partial disability benefits of $1 a week. CX 3 at p. 19. Claimant requested additional compensation and medical benefits. CX 3 at 20.

On September 21, 2001, Claimant was evaluated by Dr. Spitzer. CX 10 at 219. Claimant mentioned his hip had improved and did not limit him significantly. CX 10 at 219. Claimant also stated he was not experiencing any significant amounts of pain. CX 10 at 219. Dr. Spitzer found Claimant healthy and did not prescribe any further medical treatment. CX 10 at 220.

Dr. Spitzer's June 14, 2002, pre trial deposition testimony corroborates Claimant's trial testimony regarding his right hip condition. Dr. Spitzer testified thatdespite the hip dislocation in 1956, Claimant was functioning adequately until his injury in 1988. MX 4 at 40. Claimant's 1988 injury accelerated the natural progression of his arthritis causing accelerated deterioration of hiship joint. MX 4 at 40. The arthritis in Claimant's hip steadily progressed at an increased rate because of the repetitive injury process that occurred as part of his employment. MX 4 at 40-41. Dr. Spitzer stated the degenerative process is one that destroys the cartilage on the surface of the bone. MX 4 at 51. Over time an abrasive process occurs where the cartilage is steadily ground down until gradually the cartilage deteriorates and wears away. MX 4 at 54. Dr. Spitzer testified Claimant's repetitive work activities were much like an abrasive process. MX 4

at 54. The 1988 injury started the downhill process, which was than exacerbated by the repetitive continuation of work, until such time as it reached a point where it was so severe that Claimant's condition reached an end point. MX 4 at 41. Dr. Spitzer testified the intervening cartilage space that normally allows the bones to glide upon one another smoothly was gone, as the cartilage had completely deteriorated. MX 4 at 35. Claimant's January 9, 2001 pre-operative exam revealed Claimant had reached the end stage of his degenerative joint disease. CX 10 at 213. Although there may not have been significant deterioration in Claimant's overall status between the pre-operative examination and the date of surgery, there may have been more pain. MX 4 at 41. Dr. Spitzer explained that once arthritis reaches a point where almost any threshold of activity is painful, then any activity is going to have a detrimental effect on the clinical status of the patient. As the disease process is continuing to be irritated, the pain continues without necessarily a deterioration in the disease process itself. MX 4 at 65. Therefore, the trauma and aggravation continues. MX 4 at 65. Dr. Spitzer further concluded that Claimant's employment activities on his last day before surgery were, "Without question the kind of repetitive activity that can cause certainly increasing pain in arthritic trauma." MX4 at 62.

II. Discussion of Law and Facts

Last Responsible Employer

The Ninth Circuit recently established that under the "Last Responsible Employer Rule," a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries the worker suffered while working for more than one employer. *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., et. al.*, 339 F.3d 1102, 1104 (9th Cir. 2003); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The claimant's last employer is liable for all compensation due, even though prior employment may have contributed to the disability. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991).

The Ninth Circuit has applied the Last Responsible Employer Rule distinctly depending on whether the disability is an occupational disease, such as asbestos, or the result of cumulative traumas. *Metropolitan Stevedore Co.*, 339 F.3d at 1105; *Foundation Constructors*, 950 F.2d at 624. If the disability is an occupational disease, the responsible employer is the employer which last exposed the worker to the injurious stimuli prior to the date the worker became aware of suffering from the occupational disease. *Metropolitan Stevedore Co.*, 339 F.3d at 1105. In contrast, in cases where the disability is a result of cumulative traumas, so-called "two injury" cases, the responsible employer depends upon the cause of the worker's ultimate disability. *See id.* If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. *Id.* However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, the employer of the worker at the time of the most recent injury is the responsible employer. *Id*; *Foundation Constructors Inc.*, 950 F.2d at 624. In the present case, the circumstances of Claimant's right hip and back injury call for an application of the "two-injury" prong of the Last Responsible Employer Rule.

Claimant argues he injured his right hip and lower back on May 10, 1988, while employed as a longshore worker at ITS. Claimant testified that his employment at ITS on January 16, 2001, the day before his hip replacement surgery, aggravated his symptoms and condition. Therefore, Claimant contends ITS is the responsible employer because it was in fact the last employer he worked for before the surgery date. Maersk also contends ITS is the last responsible employer. Maersk argues Claimant's disability and need for surgery is a natural progression of the pre-existing condition of the May 1988 injury, designating ITSthe responsible party as it was Claimant's employer on the date of the initial injury. However, if the court finds there is an aggravation, Maersk maintains liability nonetheless runs to ITS as the aggravation ended on the last day of Claimant's employment. Therefore, both Claimant and Maersk argue ITS is the last responsible employer.

On the other hand, ITS argues there is no evidence that Claimant's work activities on January 16, 2001 aggravated, contributed to or accelerated Claimant's degenerative hip disease. ITS asserts the work that aggravated or contributed to Claimant's need for surgery occurred on or before August 20, 2000, the date Claimant reached total end stage of his disease process. Moreover, ITS argues the work thereafter did not contribute, aggravate or accelerate Claimant's need for surgery. Therefore, as Claimant worked at Maersk on August 20, 2000, ITS contends Maersk should be held liable as the last responsible employer.

Based on a review of the relevant case law and a careful analysis of the record, the undersigned finds Claimant's employment with ITS on January 16, 2001 aggravated, accelerated or permanently worsened Claimant's hip condition and that ITS bears responsibility for this impairment. First, Claimant's duties at ITS on January 16th contributed to and aggravated his hip condition. Claimant testified that his duties as a gate clerk on January 16th required repeated stepping up and down a one foot curb. TR at 81. This repeated movement was done at least seven to ten times an hour. TR at 81. Claimant testified that by the end of the day, his pain had increased. TR at 82. The testimony of Dr. Spitzer confirmed Claimant's testimony regarding the increased pain he suffered on January 16th. Dr. Spitzer stated Claimant's employment activities on his last day before surgery were, "Without question the kind of repetitive activity that can cause certainly increasing pain and arthritic trauma." MX 4 at 62. Therefore, the strenuous work activities performed on January 16th, reasonably contributed to and aggravated Claimant's hip condition.

Second, the argument by ITSthat the wor k activities that aggravated and contributed to Claimant's need for surgery occurred on or before August 20, 2000, is not persuasive. The medical reports of Dr. Spitzer, Dr. Rhodes and Dr. London conclusively reveal that Claimant's work activities following his May 10, 1988 injury exacerbated Claimant's hip condition. Additionally, Claimant's August 15, 2000, x-rays revealed complete loss of cartilage in Claimant's right hip resulting in bone on bone contact. CX 10 at 211. However, despite complete deterioration in the hip, Claimant had not yet progressed to a point of maximum disability. Dr. Spitzer testified that although there may not have been significant deterioration in Claimant's overall status, there may be continued pain. MX 4 at 41. In the months leading to surgery, Claimant's medical records consistently note numerous complaints of pain in the right back and hip. ITSX 4 at 119; CX 10 at 213. This demonstrates the trauma and aggravation continued without necessarily deterioration in the disease process itself. MX 4 at 65. Therefore,

the work that aggravated and contributed to Claimant's need for surgery continued right through his last day of employment.

Third, ITS argues liability should not be transferred to ITS based on Claimant's intentional placement of work on one day, for the sole purposes of transferring liability. This argument is not persuasive as Claimant's intent is not at issue. The issue, however, is whether Claimant's condition was aggravated during his last day of employment with ITS. Substantial evidence in the record conclusively proves Claimant's work duties at ITS aggravated and contributed to Claimant's need for surgery. Therefore, liability runs to ITS.

Lastly, although assignment of liability to ITS by the Last Responsible Employer Rule may seem unfair, the Ninth Circuit established this bright line rule to avoid the difficulties and delays connected with trying to apportion liability among several employers. *Metropolitan Stevedore Co.*, 339 F.3d at 1107. The rule allows the apportionment of liability in an equitable manner, since all employers will be the last employer a proportionate share of the time. *Id*; *Foundation Constructors Inc.*, 950 F.2d at 623. The undersigned finds no reason to depart from this bright line rule.

Therefore, the undersigned finds substantial evidence in the record supports a finding that ITS, as the last responsible employer, is liable for the totality of Claimant's disability.

Date of Maximum Medical Improvement

An injured worker's impairment under the Act may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI". *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see also SGS Control Services v. Director, OWCP*, 86 F. 3d 438, 443-44 (5th Cir. 1996). Any disability before reaching MMI would be temporary in nature. *Id*. The date of maximum medical improvement is defined as that time at which the employee has received the maximum benefit of medical treatment such that his condition will not further improve. The determination of the date of MMI is primarily medical and does not rely on economic or vocational considerations. *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984). Medical evidence must establish the date at which the employee has received the maximum benefit from medical treatment such that his condition will not further improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). Accordingly, the determination as to when maximum medical improvement has been reached, so that a claimant's disability may be termed "permanent," is primarily a question of fact based upon medical evidence. *Lozada v. Director, OWCP*, 903 F. 2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

Based on the medical evidence provided in the record, the undersigned finds Claimant's condition reached maximum medical improvement on September 21, 2001, approximately nine months after his hip replacement surgery. On April 19, 2001, Dr. Spitzer approved Claimant's

return to work activities with restrictions. Dr. Spitzer recommended Claimant continue his outpatient physical therapy treatments to further rehabilitate his hip muscle. CX 10 at 218. On June 17, 2001, Claimant was examined by Dr. London and complained of stiffness and soreness in his right hip. CX 12 at 242. Dr. London opined Claimant could return to work, but should be restricted from duties involving repeated climbing, kneeling or awkward positions. CX 12 at 243. Dr London also indicated in his June 17th report that Claimant's right hip condition was permanent and stationary. CX 12 at 242. However, Claimant continued to see Dr. Spitzer for his right hip following this date. Claimant was examined by Dr. Spitzer on September 21, 2001. CX 10 at 219. Assuming arguendo that Claimant had continued his physical therapy treatments up until this point, he was still receiving the benefit of medical treatment to help improve his condition. In his September 21st medical report, Dr. Spitzer concluded Claimant's condition had improved since surgery and did not prescribe further medication or physical therapy treatments. CX 10 at 219. The fact that there is no evidence of medical treatment after September 21st, allows me to believe Claimant had reached maximum medical improvement. Thus, although Dr. Spitzer did not expressly conclude Claimant's condition had become permanent and stationary it is held that Claimant reached maximum medical improvement with regard to his right hip on September 21, 2001.

Extent of Disability

Under the Act, Claimant has the initial burden of establishing the extent of the disability. *Trask*, 17 BRBS at 60. "Disability" under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. 33 U.S.C. §902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). As Claimant's injury is a non scheduled injury, he must prove that he has suffered a loss of wage-earning capacity.[3]

Claimant is entitled to temporary total disability benefits beginning January 17, 2001 and ending September 21, 2001, the date of MMI. However, Claimant also seeks permanent partial disability benefits from June 3, 2001 to the present. AX 2. Claimant's average weekly wage ("AWW") when injured was $2,648.90. AX 2; AX 4. However, Claimant argues his retained weekly earning capacity is $2500 based on his current earnings and other facts. AX 2. ITS, on the other hand, argues there has been no loss in current earning capacity as Claimant continues to earn $2,648.90, a figure also based on current earnings and other facts. AX 4.

The record is devoid of any arguments or evidence demonstrating the difference in Claimant's pre-injury and post-injury earning capacity. Therefore, the undersigned finds Claimant has failed to satisfy his burden of establishing the extent of his disability as he has not provided any additional evidence to prove he has suffered a loss of wage-earning capacity.

Interest

[3] A partial disability to the hip is compensated under Section 8(c)(21). *Jones v. Newport News Shipbuilding and Dry Dock Co.*, BRB No. 02-0227 (2002). The hip is a part of the body distinct from the leg and is not expressly in the schedule. *Strube v. Trans Pacific Container*, 32 BRBS 651, 655 (1998) (ALJ).

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), aff'd in part, rev'd in part sub nom.; *Newport News Shipbuilding & Dry Dock Co., v. Director*, OWCP, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.I. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by the Employer should be included in the District Director's calculations of amounts due under this decision and order.

Entitlement to Medical Expenses

Claimant is entitled to medical care under Section 7 of the Act for his past medical expenses related to his hip condition. Under Section 7(a), reasonable and necessary medical expenses incurred since the industrial injury may be assessed against the employer. 33 U.S.C. §907(a); *Pernell v. Capitol Hill Masonry*11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. §702.402; *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). The record establishes Claimant has outstanding medical bills to his union group medical insurance plan. AX 2; AX 4. Claimant is also entitled to reasonable, necessary and appropriate future medical costs related to his hip injury. MX 4 at 71. This includes the occasional aches and pains associated with an artificial joint, which may require intermittent medications, physical therapy, and regular access for periodic examinations by his doctor.

Attorney Fees and Costs

According to Section 28(a) of the Act, a claimant who engages an attorney in the "successful prosecution" of his claim may collect a reasonable attorney's fee from his employer. Thirty (30) days is hereby allowed to Claimant's counsel from the submission of such an application. See 20 C.F.R. 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Facts, Conclusions of Law and upon the entire record, I issue the following order.

It is therefore **ORDERED** that:

1. ITS shall pay Claimant compensation for temporary total disability for the period beginning January 17, 2001 and ending September 21, 2001.

2. The District Director shall make all calculations necessary to effectuate this decision.

3. ITS shall pay all outstanding medical bills related to Claimant's disability and shall furnish reasonable, appropriate and necessary medical care and treatment to Claimant's hip injury as required by Section 7 of the Act.

A

Russell D. Pulver
Administrative Law Judge